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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.,
Petitioners

v.

EAZOR EXPRESS, INC., ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINIONS BELOW

The opinion of the District Court on liability is reported at 357 F. Supp. 158 and is reproduced at pp. 2a-20a. of the separately bound appendix to this petition ("App."). The opinion of the District Court on damages is reported at 376 F. Supp. 841 and is reproduced at App. 21a-37a. The opinion of the Court of Appeals is reported at 520 F.2d 951 and is reproduced at App. 39a-77a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1975 (App. 78a-79a). A timely petition for rehearing was denied on August 29, 1975 (App. 80a).

On November 7, 1975 and December 19, 1975, Mr. Justice Brennan entered orders extending the time within which to file a petition for a writ of certiorari until December 29, 1975 and December 31, 1975, respectively. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. (a) Where the members of a union engage in a work stoppage unauthorized by the union, but in violation of the no-strike clause of the applicable collective bargaining agreement, does the union have a duty, enforceable by the employer in a suit under § 301 of the Labor Management Relations Act of 1947, to use every reasonable means to terminate the strike?

(b) In a suit against a labor union permitted by § 301(b) of the Act which provides that a union "shall be bound by the acts of its agents," may the union be held liable for an unlawful strike by all its members employed by a particular employer, when those members constitute 6% or less of the union's total membership and the union did not authorize the strike?

(c) Where a union has a contractual duty, express or implied, to use every reasonable means to terminate an unauthorized strike, by what standards should the union's performance of that duty be measured? In the event of a breach of that duty, how are the employer's damages to be determined?

2. (a) Where the measure of a plaintiff's damages is his loss during a particular period, and trial of that issue has consumed weeks of conflicting testimony, does the trial court comply with the requirements of Rule 52(a), Federal Rules of Civil Procedure, by simply stating its conclusion as to the amount lost,

without making any subsidiary findings which show how conflicts were resolved, what competing accounting theories were adopted, and what computations were made to reach that conclusion?

(b) Where an award of prejudgment interest is permissible as an exercise of equitable discretion by the district court, must the court make findings which disclose that it has exercised its discretion and the equitable basis for granting interest?

(c) When a court of appeals substantially increases the amount of a judgment to which the district court had appended prejudgment interest, is remand required for a renewed exercise of the district court's discretionary power with respect to the grant or denial of prejudgment interest? If not, may the court of appeals grant prejudgment interest on the increased judgment without disclosing that it has exercised its discretion and the equitable basis for granting interest?

STATUTE AND RULE INVOLVED

This case involves §§ 301(a), (b) and (e) of the Labor-Management Relations Act of 1947, (hereafter "the Act") 61 Stat. 136, 156, 29 U.S.C. §§ 185 (a), (b) and (e), and Rule 52(a) of the Federal Rules of Civil Procedure. These are set forth in the statutory appendix to this brief at pp. 1b-2b, *infra*.

STATEMENT OF THE CASE

Introduction

This Petition seeks review of a judgment in excess of one million dollars plus prejudgment interest, for damages allegedly suffered by an employer during a work stoppage which the courts below found was not au-

thorized by any of the defendant unions. The theory of the judgment was that the unions breached their agreement with the employer by failing to use every reasonable means to terminate the strike and that they could also be held liable for the "mass action" of all the unions' members employed by a particular employer, although those members were but a minute fraction of each defendant's total membership. In concluding, with hindsight, that the union should have taken "stronger measures" to terminate the strike (App. 59a) than declaring the strikes to be illegal and instructing and persuading the striking members to return to work, the courts did not take into account the fact that the employer did not call upon the union to take such measures, nor other surrounding circumstances which tended to show that these would have been unsuccessful, if not indeed, as the union officials believed, counterproductive. The plaintiff was awarded all its strike losses after the first two days of the strike, although there was no finding that if the unions had not breached the agreement, the strike would have ended then, or any time before it actually did. Although there was a lengthy and complicated trial to determine the amount of the plaintiffs' strike losses, the District Court simply stated a figure which represented its conclusion on that issue, providing the parties and the appellate courts with no explanation as to how that figure was reached; the Court of Appeals affirmed despite the specificity requirements of Rule 52(a) F.R.Civ.P. and although the absence of underlying findings made meaningful review impossible. The District Court added prejudgment interest, without stating whether it did so under a felt compulsion of law, or in the exercise of discretion, and if the latter, the basis of that exercise; again the Court of Appeals affirmed despite the absence

of findings and although its decision on the merits approximately doubled the original judgment, raising prejudgment interest alone to above $350,000.

I. THE FACTUAL BACKGROUND

A. The Parties and the Agreements

Respondent, Eazor Express, Inc. (Eazor) and respondent, Daniels Motor Freight, Inc., (Daniels) which is now wholly owned by Eazor, are motor carriers engaged in interstate commerce. (They will sometimes be referred to jointly as "the employer"). Petitioners Local 249 and Local 377 are labor organizations affiliated with petitioner International Brotherhood of Teamsters (hereafter "IBT"). Local 377 was the exclusive bargaining representative of the drivers and other employees at Daniels' terminal in Warren, Ohio; Local 249 was the exclusive representative of drivers and other employees working out of, or at Eazor's Pittsburgh terminal. Eazor, Daniels and the locals were parties to the National Master Freight Agreement in force between April 1, 1967 and March 31, 1970, ("NMFA"); it is, as the name implies, a nationwide agreement covering employers and unions in the trucking industry. To this master agreement there were various regional supplements binding upon certain employers and local unions. The Teamsters Joint Council No. 40 Freight Division Over-the-Road Supplemental Agreement and the Teamsters Joint Council No. 40 Freight Division Local Cartage Supplemental Agreement were the supplements binding on Eazor and Local 249; the Central States Area Over-the-Road Motor Freight Supplement with Ohio rider and the Central States Area Local Cartage Supplemental Agreement

bound Daniels and Local 377.[1] The courts below determined that the IBT was also a party to and obligor under the NMFA and its supplements (App. 17a-18a and 46a-48a).[2]

The NMFA contains no no-strike clause. Moreover, the NMFA contains the following exculpatory provision:

> "Job Stewards and alternates have no authority to take strike action, or any other action interrupting the Employer's business, except as authorized by official action of the Local Union. The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the Union liable for any unauthorized acts. The Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, slowdown or work stoppage in violation of this Agreement." (App. 52a-53a)

Each supplemental agreement contains substantially the following no-strike clause:

> "The Unions and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, of any controversy which might arise." (App. 42a)

The Central States Supplement also contains the following language:

> "Section 2. It is further mutually agreed that the Local Union will, within two weeks of the date of

[1] They will be referred to herein as the "Joint Council No. 40 Supplement" and "Central States Supplement" respectively.

[2] IBT disagrees with this holding, but in order to narrow the issues in this Court, does not seek review thereof.

> the signing of this Agreement, serve upon the Employer a written notice, which notice will list the Union's authorized representatives who will deal with the Employer, make commitments for the Union generally, and in particular have the sole authority to act for the Union in calling or instituting strikes or any stoppages of work, and the Union shall not be liable for any activities unless so authorized. . . . It is further agreed that in all cases of an unauthorized strike, slow-down, walk-out, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from such unauthorized acts of its members.
>
> "While the Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above, it is specifically understood and agreed that the Employer during the first twenty-four (24) hour period of such unauthorized work stoppage shall have the sole and complete right of reasonable discipline short of discharge, and such Union members shall not be entitled to or have any recourse to any other provisions of this Agreement. After the first twenty-four (24) hour period of such stoppage, and if such stoppage continues, however, the Employer shall have the sole and complete right to immediately discharge any Union member participating in any unauthorized strike, slow-down, walk-out, or any other cessation of work, and such Union members shall not be entitled to or have any recourse to any other provision of this Agreement. . . ." (App. 53a-54a)

The Joint Council No. 40 Supplement contains no undertaking with respect to unauthorized strikes.

B. The Unauthorized Work Stoppage and the Unions' Efforts To Terminate It

1. The Work Stoppage [3]

On August 17, 1968, Daniels discharged one Roper, a member of Local 377, and on the 19th it discharged another, one Eckley. On the morning of the 20th, meetings were held to resolve the grievances arising from these terminations. When they proved fruitless, Roper and Eckley began to picket the Daniels Warren terminal. The members of Local 377 then walked off their jobs and the strike began. The next morning members of Local 377 established a picket line at Eazor's Pittsburgh terminal which the members of Local 249, employed by Eazor, refused to cross. The discharged employees did not exhaust the contractual grievance procedure, the strikes were unauthorized by the unions, and were in direct violation of the no-strike clauses of the respective supplements to the NMFA. The local union stewards and committeemen at the Warren and Pittsburgh terminals took no steps to dissuade their fellow employees from striking, but participated in and led them.

The strikes were characterized by an accelerating pattern of violence which persisted, despite efforts to enforce injunctions issued by the Court of Common Pleas at Pittsburgh and the United States District Court at Cleveland to control it. The violence included commandeering on the highway plaintiffs' drivers not involved in the strikes and compelling them to abandon their equipment, large scale destruction of Eazor equipment, threats of violence, and shootings, and,

[3] This description of the circumstances of the work stoppage is taken from the Court of Appeals' narration (App. 42a-45a).

finally, on September 16 an open assault by hundreds of persons on a convoy of Eazor trucks operated from the Pittsburgh terminal under police protection pursuant to a specific order of the Court of Common Pleas. *Eleven of these persons, all members of Local 249, were arrested, convicted and imprisoned for criminal contempt by the Court of Common Pleas.*

Within two or three days of the beginning of the strike Daniels discharged the two union stewards, two union committeemen and 26 other employees. At a hearing before District Judge Lambros in Cleveland the union officials proposed that Daniels permit all employees to return to work without penalty, including the employees whose discharge triggered the work stoppage, whose reinstatement would then be subject to the grievance procedure.

Daniels rejected this offer and indicated that it was unwilling to negotiate the status of the discharged employees until the employees not discharged returned to work. Shortly after this meeting the plaintiffs offered to reinstate all the Local 377 strikers who had been discharged except Roper, Eckley, the stewards and the committeemen, but this offer, which was recommended by Local 377's chief officer and the striking union members' counsel, was rejected by the strikers at Warren. On the same day Eazor at Pittsburgh discharged a 249 steward, a 249 committeeman and one member of 249. Daniels and Eazor then sent letters to all striking Local 377 and 249 members, respectively, other than Roper, Eckley, the stewards and the committeemen, offering them the opportunity to return to work without penalty if they returned on September 11 and with a three-day penalty for each day's participation in the strikes if they returned on September 16. The strikers, how-

ever, rejected this offer and on September 17 Daniels sent letters of discharge to 157 striking employees at Warren and permanently closed that terminal thereby ending the strike there. On September 24 the striking members of Local 249 took a vote, for the first time by secret ballot, and voted to return to work. The next day, September 25, they went back to work at the Pittsburgh terminal and the strike there was over.

2. The Unions' Efforts To Terminate the Strike

The Court of Appeals acknowledged that "There is no doubt that officers of the two local unions and of the Teamsters International Union repeatedly characterized the strikes as unauthorized and illegal and made a series of appeals, both written and verbal, to their striking members to return to work." (App. 43a) This bland description fails to convey the vigor of their actions or the stiff resistance of the members employed by Daniels and Eazor. From the very first the strikers reacted angrily against the union officials who urged and directed them to return to work, booing them, and threatening violence against them. (7JA 2537-2538, 2542-2543, 8JA 2882).[4] Their defiance of the union officials, of their employer, and even of the courts, as well as their widespread violence more than justified the District Court's characterization of the strikers' mood as "ugly" (App. 16a). It was not until after the strike leaders had been jailed for contempt of court and many of the men discharged, and the Warren terminal closed, that the men who remained realized the futility of continuing their strike.

Perhaps the strongest evidence that the unions did all that was expected from them under the contract is what

[4] "JA" refers to the Joint Appendix in the Court of Appeals.

the company said during the strike. Thomas Eazor testified concerning a meeting with Local 249 and Joint Council officials on August 21, the day the picket line was put up in Pittsburgh:

> Q. Did you make any specific suggestions to them (Union officials) as to what they should do to terminate the strike as the strike proceeded?
>
> A. Yes, sir.
>
> Q. What were some of the suggestions that you made?
>
> A. I told them they should have their people go down and get on that line and do everything in their power, what I mean, to get these boys to listen to them, to go back to work. I suggested they call meetings with them up in the union hall, and persuade them, I mean, to listen to them, to take their orders and go back to work, and handle what grievances they had under the terms and conditions of the contract. (9JA 3135)

On August 27, Eazor acknowledged both the unions' role in attempting to end the strike and everyone's difficulty in achieving that goal, when it wrote to the striking employees: "You have defied the International Union. You have defied the Local Union. You have defied the law." And on September 6, Eazor's labor relations representative wrote to the Assistant to the International's General President conveying his "personal thanks for your help in this endeavor" and expressing the hope that "this thing reaches a head soon." (2JA (Exhibits) 362a; 4 JA (Exhibits) 1158a)

II. PROCEEDINGS BELOW

A. The District Court

1. Liability

Eazor and Daniels brought these actions under § 301 of the Act. Trial in the District Court was without a

jury and was bifurcated for separate determination of liability and damages. On March 30, 1973 the District Court decided that defendants had breached the agreements. The court rejected plaintiffs' contention that Local 377 autuhorized the strike. But he concluded that defendants were obligated to "use 'every reasonable means' to end the strike" (App. 8a). He concluded that none of the defendants had satisfied that duty. In his view "the circumstances called for the politics of power rather than the politics of persuasion." (App. 16a). And he expressly refused to give any weight to the unions' judgments as to what means were "reasonable."[5]

2. Damages

The damage phase of the trial occupied weeks of conflicting testimony, including that of accounting experts, principally dealing with the question as to how much loss was sustained by Eazor-Daniels during the strike period. The answer to this question turned on such subsidiary issues as whether the loss sustained during the strike should include the full cost of deferred maintenance performed during the strike; whether depreciation should be allowed on rolling stock during the time in which it was not rolling; whether a subsequent settlement of warranty claims against Ford Motor and Mack Truck should be credited back in part to the strike period; whether losses sustained in branches of plaintiffs' operation which were not affected by the strike should be included in strike period losses; whether monies paid during the strike for expenses incurred before the strike commenced should be included in strike period losses, and if so, to what

[5] App. 18a-19a, n. 18.

extent; whether plaintiffs' or defendants' accounting experts were the more credible and the more expert.

In deciding the damage issues the trial court declined to explain how it resolved any of the "disputes over the intricate mysteries of accounting techniques" (App. 23a), but simply stated that "Plaintiff submits and the Court finds that during the period [of the strike] Eazor lost a total of $1,079,322.00" which became the "starting point" of the strike loss calculation (Id. 26a). (While plaintiff did so submit *on brief,* its own accounting expert had testified, and its own Exhibits showed that those losses were a maximum of $696,255.[6] Plaintiff's post-trial submission was based on the original consolidated statement which plaintiff's counsel had previously represented to the court had "substantially overstated the losses for those months" and disregarded all of the adjustments which had been made by Eazor's accountants in attributing revenues and expenses to proper periods.)[7] The trial judge then adjusted this "starting point" (App. 26a, 30a) for two days of non-culpability, for seventeen days of non-mitigation and for the exclusion of non-recoverable legal fees, thereby producing the amount of the judgment. Moreover, without a single word of explanation as to why he was doing so, the trial judge simply tacked prejudgment interest to the judgment (App. 38a), a matter of approximately $175,000.

[6] Eazor Ex. 183 and Int. Ax. Y-2 (prepared by Eazor, 3JA (Exhibits 855a, 4JA (Exhibits 1176a).

[7] Exhibit P-180, 3JA (Exhibits 853a).

B. The Court of Appeals

The Court of Appeals held that "necessarily implied in the unions' agreement that there should be no strike was an obligation on their part to use every reasonable means to bring to an end a strike begun without their authorization." (App. 50a). It also held that the unions were liable also on the "so-called mass action theory[:] When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union * * * mass action by union members must realistically be regarded as union action." (Id. 57a). The court agreed with the trial court that the unions had failed to use all reasonable means to end the strikes, because they did not use "stronger measures" which were "available". It held that these were: to discipline or remove the job stewards and committeemen who were organizing and leading the strikes; to suspend or fine the striking union members; to impose a temporary trusteeship on the local unions; and to take an earlier secret ballot vote of the striking members. (App. 59a). The court asserted also that the unions "cannot now be heard to urge that the measures to which they did not resort would not have proved successful," (App. 64a) that is, that their "breach" did not prolong the strike and therefore was not the proximate cause of the strike losses.

The court held that Eazor was entitled to recover, as damages, its total strike loss after the unions first failed to take one of these "stronger measures." In so doing, the court in effect converted the "every reasonable means" obligation into a duty to hold Eazor harmless for any damages resulting from the strike.

"The unions' no-strike pledge was not an aleatory promise conditional upon the happening of a fortuitous event in the future. It was rather an undertaking that there should be no strike by union members during the term of the agreement in violation of the no-strike pledge." (App. 63a).

The court acknowledged the "great deal of evidence" offered on the amount of plaintiffs' losses resulting from the strike and that such "evidence was in many respects sharply conflicting" (App. 65a). But it both sanctioned the trial court's failure to make findings resolving these issues and refused to re-examine them. Instead, it accepted that court's $1,079,332 figure. It then rejected his adjustments for non-mitigation and disallowed legal fees (App. 74a), allowed the two-day adjustments for non-culpability and entered a modified judgment for $1,032,580 (App. 76a). Purporting to answer the Unions' complaint that the trial court's award of prejudgment interest was improper and totally unsupported by findings, the court below tacitly assumed that the award was the result of trial court's exercise of its discretion, and although the basis, if any, upon which the trial court had exercised that discretion, was unknown, held that it was not abused. (App. 77a). And it further determined, without discussion, or even any indication that this result was not automatic, that interest should still be awarded although by doubling the judgment on appeal interest alone was increased to over $350,000. (App. 79a).

REASONS FOR GRANTING THE WRIT

I. IN IMPOSING LIABILITY ON PETITIONERS THE COURT BELOW DECIDED QUESTIONS OF ALMOST UNIVERSAL IMPACT ON THE APPLICATION AND NEGOTIATION OF COLLECTIVE BARGAINING AGREEMENTS AND VIOLATED THE PRECEPTS OF CONGRESS AND THIS COURT.

A. Over 93 percent of major collective bargaining agreements contain a no-strike clause.[8] This alone would warrant review of the unprecedented holding below that necessarily implied in the union's agreement that there should be no strike was an obligation on their part to use every reasonable means to bring to an end a strike begun by their members without their authorization.

In *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, cert. denied, 350 U.S. 847, the Fourth Circuit held unanimously that absent evidence that its officers "participated in, ratified, or encouraged the continuance of the strike" the union could not be held liable for breach of that promise even if those officers had done nothing to get the men back to work. Id. at 877. So too, the Sixth Circuit in *North American Coal Corp.* v. *Local Union 2262, etc.*, 497 F.2d 459, 467, n.3 expressly "decline[d] to follow *Eazor*", referring to

[8] This figure is calculated from U.S. Bureau of Labor Statistics, Dept. of Labor, Bull. No. 1822, *Characteristics of Agreements Covering 1,000 Workers or More, July 1, 1973* (1974) Table 72, p. 65. The Labor Department Study revealed that of the 1,339 agreements covering 6.7 million workers analyzed, 779 agreements covering 4.7 million workers were subject to limited no-strike bans (defined as "a statement prohibiting strikes or lockouts except under given circumstances or for specific uses." *Id.* at n.2). In addition, 474 agreements covering 1.6 million workers contained absolute no-strike clauses (defined as "an unmodified statement prohibiting strikes or lockouts." *Id.* at n.1), yielding a total of 1,253 agreements covering 6.3 million workers which contain some form of express no-strike clause.

the District Court's decision herein. Although the District Court herein candidly cited *Haislip* as "*contra*" (App. 12a, n.13), the Court of Appeals sought to distinguish *Haislip* on the ground that there the obligation not to strike had been implied from the promise to submit contract disputes to final and binding arbitration (presaging *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 105), whereas here the no-strike obligation was expressed in so many words. (App. 51a). While that distinction has since been endorsed by the Fifth Circuit,[9] it has no basis in *Haislip* or *Lucas Flour*,[10] has already been rejected by this Court in a related context,[11] is contrary to accepted principles of contract interpretation,[12] and represents exceedingly poor labor relations policy as well, given the importance which the Act attaches to written agreements, see § 8(d) codifying the rule of *H.J. Heinz & Co.* v. *Labor Board*, 311 U.S. 514, 523-526, and §§ 302(c)(4) and (5). At best, the validity of the distinction proffered by the Court of Appeals is itself a question of law under § 301 of the Act which this Court should now

[9] *United States Steel Corp.* v. *United Mine Wkrs. of Am.*, 519 F.2d 1249, 1254-1255.

[10] Neither Judge Parker in *Haislip* nor this Court in *Lucas Flour*, even remotely suggested that the no-strike duty implied from the promise to arbitrate contract disputes differs in any respect from the duty to which the union is subject under an express promise not to strike over such disputes.

[11] *Gateway Coal Corp.* v. *Mine Workers*, 414 U.S. 368, 381 squarely decided that the rule of *Boys Markets* v. *Retail Clerks*, 398 U.S. 235 governs whether the contractual undertaking not to strike is express or implied.

[12] "Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent". Restatement of Contracts, § 5, Comment a. See also Williston, Contracts, § 3, pp. 8-9 (3d ed. 1957); 1 Corbin, Contracts § 18, pp. 39-42 (1960).

decide because it directly affects not only the soundness of the decision below with respect to agreements which contain no-strike clauses, but also those 6% of major agreements which do not, but which do provide for final and binding arbitration, and from which the no-strike obligation is therefore implied under *Lucas Flour,*[13] leaving untouched by the decision below only 1% of all collective bargaining agreements presently in force.

Additionally, the decision below will inevitably burden the negotiation of new collective bargaining agreements. Henceforth unions will be reluctant to accept a no-strike clause, lest they thereby unwittingly commit themselves also to the duty to police strikes which they have not authorized, participated in or ratified. Their reluctance will be compounded by the standard which the court below established for judging performances of that duty, a standard which does not take into account the surrounding circumstances, such as the legal limitations on union's authority, the failure of the employer to demand action by the union or the reasonableness of the union officials' judgment that their actions would aggravate rather than terminate the work stoppage. Nor will unions readily jeopardize their assets by submitting to the regime imposed by the court below, whereunder the plaintiff employer is relieved of the need for establishing that the breach proximately caused the damages claimed, because the union "cannot

[13] See the Labor Department Study cited at p. 16, n.8, *supra* at Tables 70-72. Petitioners obtained a computer print-out of the data underlying these tables and determined therefrom that of the 1,339 contracts covering 6.7 million workers included in the Study, 83 contracts, or 6 percent of the total (covering 411,000 workers) did not contain no-strike clauses, but provided for binding arbitration of some or all issues.

be heard to say" (App. 64a) that the strike would have continued even if it had employed all reasonable means to terminate it.

On the other hand, it will frequently be impossible for parties to express their full intentions without including some express no-strike commitment in the agreement. For example, since *Lucas Flour* did "not * * * suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration" 369 U.S. at 106, parties who intend to submit only *some* disputes to final and binding arbitration, but intend to forbid the union from striking over *any* disputes, can do so only by spelling out that no-strike obligation in terms. Precisely because of their importance to both sides, no-strike clauses are commonly drafted in considerable detail to define the kinds of work stoppages which the union may not authorize. The process will be complicated enormously, if, by including an express no-strike obligation (without which such definition is impossible), the parties will run the risk that they will be deemed to have created the additional union duty to terminate unauthorized strikes.[14] That risk will be nationwide because even a court which disagrees with the Third Circuit's analysis in *Eazor* might well reason that parties who, while

[14] The opinion below leaves considerable doubt as to how the parties could, by the express terms of their agreement, successfully exclude such liability. For while the court accorded the fullest sweep of implication to the no-strike clause, it gave the narrowest possible breadth to the contractual language of exoneration, such as, for example, the employers' disavowal of claims against the union for unauthorized acts (App. 52a-54a). This erroneous and unbalanced approach to contract interpretation raises additional problems for collective bargaining which independently merit this Court's attention and correction.

Eazor is on the books, enter into an agreement which contains a no-strike clause, thereby intend to create the duty which *Eazor* implies. "Like other contracts, [a labor agreement] must be read as a whole and in the light of the law relating to it when made." *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 279.

B. On the merits, we submit that the court below was wrong in this case, and Judge Parker was right in *Haislip,* where he wrote:

> There is nothing in the contract making defendants liable for "wild cat" strikes or requiring that they take any action with regard to them. This court has pointed out that employees who engage in "wild cat" strikes lose the protection of the [National Labor Relations] Act and may be discharged by their employers with impunity for so doing. N.L.R.B. v. Draper Corporation, 4 Cir., 145 F.2d 199, 156 A.L.R. 989. We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability. If [the union agents] had done nothing when plaintiff called on them to get the men back to work, there would have been no liability on the part of the defendants. This being true, defendants were not rendered liable by the efforts which these men made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. *The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike.* There is no evidence of any sort that they did. (223 F.2d at 877-878, emphasis added).

But the Court of Appeals herein said that:

> a no-strike agreement would be illusory indeed were a union to be permitted to avoid all responsibility under it for the duration of a prolonged strike which was being carried on by the concerted action of all its members employed in the struck operation, merely because the strike was not initially authorized or called by the union as an organization or by those of its officers who were specially empowered to do so. Rather than to construe a contract as producing such a result, the courts will favor a construction making the mutual promises binding and giving the contract legal effect." (App. 50a)

The principle of contract interpretation invoked by the court is entirely sound, but has no proper application to this case, for a no-strike agreement is far from "illusory" if it is understood, as it hitherto has been, as a promise by the union that *it* will not authorize, participate in or ratify work stoppages during the life of the agreement. That management regards this promise to be a substantial benefit is evidenced most clearly by the prevalence of no-strike clauses, and the almost universal insistence thereon by employers in the many years before the Court of Appeals implied therefrom the additional union duty to police unauthorized strikes. Management has relied for protection against unauthorized strikes on its privilege to discharge or otherwise discipline those who lead or participate therein. That privilege was confirmed in 1947 by an amendment to § 13 of the Act which preserved the "limitations" and "qualifications" on the right to strike, one of which is the rule of *Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332, 344, that the Act does not prohibit the discharge or other discipline of "employees who strike in breach of contract." [15] It is

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[15] S. Rept. No. 105 on S.1126, 80 Cong. 1st Sess., p. 28, 1 Legislative History of the Labor Management Relations Act, 1947 (hereafter "Leg. Hist.") 434.

in *this* sense that the no-strike promise was "binding upon the individual union members on whose behalf the union signed the agreement" (App. 52a); to reason as the court below did, that the union (the bargaining agent) was responsible for the breach by the members (its principal) is to create liability on the novel principle of *respondeat inferior*. Moreover, the court below also failed to appreciate that in 1947 Congress reduced the disciplinary powers of unions even over their own members. As was explained in *NLRB* v. *Allis Chalmers Mfg. Co.*, 388 U.S. 175, 184-185 (the case mistakenly relied on below (App. 52a)), Congress by §§ 8(a)(3) and 8(b)(2) deprived unions of the right to cause their members to lose their jobs because they violated a membership obligation. [16]

Professor Cox accurately prophesied the effect of this enactment on the problem of unauthorized strikes:

> The most disturbing aspect of Section 8(a)(3), however, is the provision making it an unfair labor practice to discharge an employee pursuant to an authorized union shop agreement for any reason other than non-payment of dues. By depriving the majority representative of power to expel from the plant individuals seeking to undermine its position, this provision encourages the growth of the dissident groups and dual unionism that breed jurisdictional strife. By depriving the union of its most effective means of disciplining workers who disregard their obligations under a collective agreement, the provision also disables the union from accepting responsibility for the employees' observance of the other terms of a collective agreement. For example, under a true union shop arrangement, a labor union could take

[16] See also *Radio Officers* v. *Labor Board*, 347 U.S. 17, 40-41; *Labor Board* v. *General Motors*, 373 U.S. 734, 742-743.

> effective action to halt wildcat strikes. It could order the men back to work and, if they disobeyed, suspend or expel them, thus bringing about their lay-off or discharge. *Under Section 8(a)(3) the back-to-work order would be an empty gesture, for the union would have no effective sanction by which it could be enforced.* Under such circumstances it is unlikely that unions will voluntarily accept any responsibility for the conduct of the employees they represent. [17]

In this legal context it cannot be maintained that in order to "mak[e] the mutual promises binding and to give the contract legal effect" (App. 50a) the union must be bound to enforce the no-strike clause through its sharply circumscribed authority; rather it becomes clear that, as the Fourth Circuit understood, parties who place a no-strike commitment into their agreement intend that it will be enforced against the striking employees by the employer, who may discharge them "with impunity" 223 F.2d at 877, citing *NLRB* v. *Draper* 145 F.2d at 199, a case which followed *Sands*, *id.* at 204.

Contrary to the view of the court below, the implication of a duty to police unauthorized strikes does not "accord with the Congressional intent." (App. 57a). The only legislative material on which the court relied to discover that policy, a section of the 1947 Senate Report referred to at App. 56a and quoted at App. 52a, does not even remotely support that step. This section is entitled "Enforcement of Contract Responsibilities". [18] It shows that Congress' "primary concern" was that collective bargaining agreements

[17] Cox, Some Aspects of the Labor-Management Relations Act, 1947, 61 Harv.L.Rev. 274, 298-299 (1948).

[18] S. Rept. No. 105, p. 15, 1 Leg. Hist. 421.

should be legally binding and judicially enforceable against both sides; see *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 453-454, discussing and quoting the Senate Report *in extenso.* This was, of course, achieved primarily by providing in § 301 for federal jurisdiction over suits to enforce union-employer contracts. To effectuate § 301(a), Congress declared in § 301(b) that any (covered) union "shall be bound by the acts of its agents" and "may sue or be sued as entity;" in § 301(e) it provided that the common law of agency shall govern "in determining whether one person is acting as an 'agent' for another person". Congress thereby eliminated both the very loose test of responsibility under § 2(2) of the original NLRA and the difficulties of establishing union responsibility under § 6 of the Norris-LaGuardia Act. See the explanation by Senator Taft at 2 Leg Hist. 1622 quoted in full in *Haislip, supra,* 223 F.2d at 878-879, and his descriptions of its effects on union responsibility quoted at p. 27 and id., n. 22, *infra.*

"Congress was also interested in promoting collective bargaining that ended with agreements not to strike". *Lincoln Mills,* 353 U.S. at 453. But even this major objective was not to be accomplished by reading a no-strike promise into every agreement; consistent with the overall philosophy of the Bill, the Senate Report made clear that inclusion or exclusion of a no-strike promise was "a point to be bargained over." [19] All the less can that Report be read as justifying the imposition of the more onerous duty to police unauthorized strikes.

In short, § 301 is concerned with the procedure for enforcing collective agreements, not with their content.

[19] Id., p. 424.

That is left to collective bargaining. For, "the fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Porter Co.* v. *NLRB,* 397 U.S. 99, 108 quoted with approval in *NLRB* v. *Burns Security Services,* 406 U.S. 272, 287. That policy, embodied in § 8(d), (and implicit in §§ 7 and 13, *see Labor Board* v. *Insurance Agents,* 361 U.S. 477) is binding on the judiciary in suits under § 301. In *Howard Johnson* v. *Hotel Employees,* 417 U.S. 249, this Court met and rejected the contention that § 8(d) (and thus the rule of the *Burns* case, *supra*) was applicable only to the NLRB. This court held:

> Although this distinction was in fact suggested by the Court's opinion in *Burns, we do not believe that the fundamental policies outlined in Burns can be so lightly disregarded.* In *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957), this Court held that § 301 of the Labor Management Relations Act authorized the federal courts to develop a federal common law regarding enforcement of collective-bargaining agreements. But *Lincoln Mills did not envision any free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements.* Rather, *Lincoln Mills* makes clear that this federal common law must be "fashion[ed] from the policy of our national labor laws." Id., at 456. (417 U.S. at 255, emphasis added).

The court below acknowledged that there are limitations to the courts' authority to imply contractual obligations, but found precedent for its course in *Teamsters Union* v. *Lucas Flour Co.* 369 U.S. 95 and *Haislip, supra.* But *Lucas Flour* was heavily and

unsuccessfully relied on by the respondent union and the amicus AFL-CIO in *Howard Johnson.*[20] In *Lucas Flour* itself, the Court took pains to stress that its holding was applicable in only a narrow class of cases; See p. 19, *supra,* quoting 369 U.S. at 106, and *id.* at 105, n.14, expressly rejecting the proposition "that a strike during the term of a collective bargaining agreement is *ipso facto* a violation of the agreement".

The basis for distinguishing between those obligations which may and those obligations which may not be implied is not articulated in *Lucas Flour, Howard Johnson* or any other decision of this Court, but the line can be discerned from what has actually been decided: Where the implication of a duty is *necessary* in order to give meaning to a promise which is made that duty may properly be implied, but not otherwise. Thus the promise to submit disputes to final and binding arbitration is "instinct with an obligation imperfectly expressed" not to strike over such disputes.[21] On the other hand, since a collective bargaining agreement provides benefits to both sides even absent a no-strike obligation, and provides benefits to a union even if a successor employer is not bound thereby, this Court properly refused to go further in *Lucas Flour* or to adopt the union's interpretation in *Howard Johnson.* Since, contrary to the view of the court below, the implication of a duty to use every reasonable means to terminate unauthorized strikes is *not* necessary to give meaning and effect to the no-strike clause, see p. 21, *supra,* such implication is not permitted, but

[20] See Brief for Respondent, No. 73-631, pp. 32-37; Brief for American Federation of Labor and Congress of Industrial Organizations, *id.*, p. 7.

[21] Cf. Cardozo, J. in *Wood* v. *Lucy, Lady Duff-Gordon,* 222 N.Y. 88, 90, 118 N.E. 214 (1917).

rather gives one party to the agreement more than it was able to obtain in collective bargaining, contrary to the "fundamental premise of the Act". *Porter Co., supra.*

C. The "so-called mass action theory" (App. 57a) which was also invoked by the Court of Appeals, imposes liability on unions for the action of its members, notwithstanding Congress' determination in § 301(b) and (e) that they would be liable only for the acts of their "agents" according to the common law. See p. 24, *supra.* In describing union liability under his bill, Senator Taft twice gave the most explicit assurance possible that unions would not be held responsible for the actions of their members. In response to a direct inquiry by Senators Smith (N.J.) and Ferguson (who took the same view) he said:

> I think the word "agent" used here, as used in the contract section, and as used in other places in the bill, means an agent under the ordinary rules of agency, an agent of the labor union, the organization, as such. The fact that a man was a member of a labor union in my opinion would be no evidence whatever to show that he was an agent. 2 Leg. Hist. 1204-1205. See also *id.* at 1026-1027, reproduced in the margin.[22]

[22] MR. TAFT. What is a labor organization? It is an organization with officers, exactly like a corporation.

I admit it may be difficult to prove the responsibility of a union. It is sometimes difficult to prove in the case of an employer. If the wife of a man who is working at a plant receives a lot of telephone messages, very likely it cannot be proved that they came from the union. There is no case then. There must be legal proof of agency in the case of unions as in the case of corporations; but I do not think there is anything in the fact that a union is an unincorporated association which would bring about a condition in law that the act of every member is necessarily charged to the labor organization. No; I think not.

The foregoing leaves no room under this Act for imposing liability on the premise that "large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members." (App. 57a). Even if it is to be accepted as an immutable truth, subject to judicial notice, that men do not act without leaders, it is still a matter of proof whether in a particular work stoppage those leaders were the officers and agents chosen and authorized to act by the union rather than ad hoc leaders whose illegal acts generated a spontaneous following among the men. Only for the acts of the former has Congress subjected unions as entities to liability. Neither the court below nor any of the other courts which have adopted the "mass action" theory mention § 301(e), or Senator Taft's explanation thereof; they do not even stop to consider that by its action Congress has withdrawn from the courts the authority to impose liability on some judicially created "theory".[23] It is not surprising, therefore, that the

[23] In the court below, we described the unruly growth of the "mass action theory" in detail which cannot be duplicated in a Petition for Certiorari. Suffice it to say that the cases which accept the theory are almost entirely devoid of analysis, resting almost exclusively on the supposed authority of earlier cases in the line tracing back to Judge Goldsborough's oral opinion in *U.S.* v. *United Mine Workers*, 77 F.Supp. 563, 566. Those decisions failed even to consider whether his reasoning was sapped of all authority when the case was "affirmed on other grounds" (App. 57a) by the Court of Appeals (177 F.2d 29 (D.C. Cir.) cert. denied, 338 U.S. 871). It will be remembered that in *Mine Workers*, the District Court had originally enjoined continuation of a strike and expressly mandated the UMW to "forthwith instruct its members to cease the strike and immediately return to their employment" (id. at 33). It was the union's failure to obey that mandate which the Court of Appeals deemed to be contemptuous. That court also said that if Lewis, the President, had at the beginning sent the members a telegram directing or advising their return "neither he nor the Union would have been guilty of contempt of the

result which they reach is diametrically opposed to that reached by the courts which have decided according to the statute, such as the Fourth Circuit in *Haislip, supra,* and the Sixth Circuit in a series of cases including *Lewis* v. *Benedict Coal Co.,* 259 F.2d 346, 351-352 (Stewart, J.)[24] and *North American Coal Corp.* v. *Local Union 262,* 497 F.2d 459, 467. Even if Senator Taft had not been so explicit, the federal law of agency as declared by Chief Justice Taft in *Coronado Coal Co.* v. *United Mine Workers,* 268 U.S. 295, would be controlling:

> In our previous opinion we held that a trades union, organized as effectively as this United Mine Workers' organization was, might be held liable, and all its funds raised for the purpose of strikes might be levied upon to pay damages suffered through illegal methods in carrying them on; but certainly it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association. Id. at 304.

The wisdom of this rule, and the dangers of a harsher standard of responsibility, are given point by facts of this case of which the court below took no note. The consequence of holding the unions responsible for "all the members of a union *employed by a given employer*"

court's order" (id. at 36), even though the members continued to strike. For this reason, Judge Keech two years later refused to hold the same International in contempt of court for violating an almost identical strike injunction although 370,000 members were on strike, *United States* v. *International Union,* 89 F.Supp. 179, 181 (D.D.C. 1950).

[24] This case was affirmed in part and reversed in part on other issues in 361 U.S. 459.

(App. 57a, emphasis added) is that only 200 of Local 249's approximately 10,000 members (5JA1704) and 355 of Local 377's approximately 6500 members (6JA 2011; 7JA2509) have subjected their unions' treasury to judgments of $655,793 and $366,786 respectively; and while these employees are but 1/40 of 1% of the IBT's total membership, their "mass action" has subjected the IBT to a judgment of over one million dollars.[25]

D. Part and parcel of a contractual duty to use "every reasonable means" to terminate a strike is the standard by which performance of that duty is to be measured.[26] We submit that the term "reasonable" in an agreement, or in any rule of law created under § 301, must be interpreted as declaring an objective

[25] See also, Gould, The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act, 52 Corn. L. Q. 672 (1967). In applauding the *Haislip* decision, *supra*, Professor Gould wrote:

> • • • While it would seem proper to say that a union must vigorously disavow striking stewards, section 301 cannot be read to require that the union purge itself and discipline the offending members.
>
> • • •
>
> As a matter of good sense, there are very sound reasons for a narrow concept of union liability. The union bargains for all employees in an appropriate unit, but it does not necessarily have the loyalty of all employees. Even in a union shop, the willingness to follow union leadership on economic questions, as well as matters of discipline of individual employees, may be of varying degrees and intensity. The union may not even be in a position to discipline employees who are non-members. And it is somewhat extreme to hold the union liable for damages when it takes a position opposite to that taken by the striking employees and does not encourage the strike. • • •

[26] Of course, we believe that the standard is the same whether the duty is express or implied, see text at p. 17, n.12, *supra*.

standard which requires consideration of all the circumstances. This is the meaning which this Court recently gave the term in another context under this Act: " 'Reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case." *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 257, n.5 quoting with approval, *Quality Mfg. Co.*, 195 NLRB 197, 198, n.3.

This is not remotely the test applied by the court below. It held that the fact that "[n]o stronger measures from the unions' arsenal [than instructions and persuasions] were ever employed, * * * although they were available" (App. 59a) was sufficient to establish the breach.[27] The court did not consider that Congress had depleted the unions' "arsenal of powerful weapons" (App. 63a) in 1947, and had left only the employers with the heavy hardware—the power to deprive strikers of their jobs. Nor did it consider that neither Eazor's threats to exercise that power nor its actual exercise brought the strike to a halt; nor did the court consider that while government's disciplinary authority is far greater than that of any private party, neither an injunction, which of course threatened fines and jail as sanctions for contempt, nor even the imposition of those sanctions terminated the strike.

[27] Later, the court actually held that only "[i]f the unions had made a showing of the use of strong and punitive measures without result it would have been for the district court to determine whether they had exhausted all reasonable measures available to them to end the strike," and even then, "the sole test would be whether available measures were within the power of the unions to employ and might be likely to be effective to end the strikes." (App. 64a).

In short, the court looked only to whether "stronger measures" were "available", not to those external circumstances which showed that they would be bootless. Nor did the court consider whether use of "stronger measures" would be counter-productive—that is, would risk prolonging the strike, or at least disabling the unions from taking any useful role. Reasonable men *do* consider all the circumstances when they plan a course of conduct; specifically, they consider the potential risks as well as the potential benefits of their actions.[28] Moreover, it is obviously not in the interest of promoting industrial peace or any of the other public policies which must be considered under § 301, to induce union officials to take actions which might exacerbate strikes, at the risk of damage suits if they fail to act.[29]

The same error of law also infected the court's decision to hold the unions liable for Eazor's total strike damages after the first two days. Having approved the finding that "the unions used only rhetoric and wholly abstained from the use of any more powerful measures, thus, in practical effect, acquiescing in the

[28] That is the standard to which the law holds our old friend, "the reasonable man": "The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since the law can have no favorites. At the same time, it must make proper allowance for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act." Prosser, *Torts* § 32, "The Reasonable Man" p. 150 (4th ed. 1971).

[29] A further objective manifestation of the reasonableness of the unions' approach is Eazor's contemporaneous approval, see p. 11, *supra*.

strike situation," it held that *"they cannot now be heard to urge* that the measures to which they did not resort would not have proved successful." (App. 64a, emphasis added). Thus, although the court acknowledged that "the liability which the unions incurred was for the damages proximately caused by the breach of their contractual obligation to use every reasonable means to end the strikes," (App. 62a-63a) it not only relieved the plaintiff of the duty to establish that damages flowed from that breach, but refused even to hear the unions' contention that the strike would have continued and the strike losses incurred, even if the unions had fully performed.[30]

But most serious of all, the court proceeded from its erroneous view of the union's powers to a further enlargement of the union's promise:

> In view of the arsenal of powerful measures available to them it is highly probable that the unions could have ended the strikes promptly, given the will to do so. We think that the plaintiffs were entitled to rely upon the unions' doing so, this being the only way in which, in the case of unauthorized strikes such as these, they could perform their no-strike promise. To hold otherwise would make a hollow mockery of the unions' no-strike pledge and would leave the plaintiffs without any remedy in damages if, as it has been held, the individual union members are not answerable in damages for illegal strike activity. (App. 63a-64a)

[30] There is no warrant in the record, or the findings, for the court's innuendoes, here and elsewhere (App. 59a, 63a) that the unions' breach was willful, but the point is irrelevant since proof of proximate cause may not be dispensed with even where there is a willful breach of contract or even where defendants' conduct is tortious. Cf. under § 303 of this Act, *Teamsters Union* v. *Morton*, 377 U.S. 252, 261-262.

Thus, in order that the employer could recover its strike losses from *someone*, the court having first read the no-strike pledge as including a duty to use every reasonable means to terminate a strike, transmuted it into a promise to hold the employer harmless for the *members'* breach of the agreement.

In *Howard Johnson,* p. 25, *supra,* this Court admonished against just such a "free-wheeling inquiry into what the federal courts might find to be the most desirable rule" and thereupon to give a party protection it could not secure at the bargaining table. 417 U.S. at 255.

II. IN AWARDING DAMAGES AND INTEREST IN THE ABSENCE OF SPECIAL FINDINGS AS REQUIRED BY RULE 52(a), F.R. CIV. P. THE COURTS BELOW DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AND THE TEACHINGS OF THIS COURT.

A. Strike Losses

Rule 52(a), F.R.Civ.P., unequivocally requires that:

> "In all actions tried upon the facts without a jury . . . the court shall find the facts specially . . . ."

But in this case, the trial court's resolution of weeks of conflicting evidence simply states that Eazor had lost $1,079,332. The court sought to justify its failure to specially find the facts by saying that the task would be "of Augean dimensions." (App. 23a).

Of course, the complexities of the evidence and multiplicity of subordinate issues made finding the facts specially all the more indispensable as part of the decision-making process of the trier and to make meaningful appellate review possible. It was grave error for the Court of Appeals to excuse the trier's

non-compliance with Rule 52(a). As this Court held in *Hatahley* v. *United States,* 351 U.S. 181:

> "[I]t is necessary in any case that the findings of damages be made with sufficient particularity so that they may be reviewed." (*Id.* at 182)

Absent relevation of the trial judge's subordinate factual findings, there is no way for an appellate court to know whose testimony he credited, which accounting theories he found to be appropriate, how he resolved the challenges to expenses for deferred maintenance and for items purchased prior to the strike; in short, whether he made missteps as he "threaded [his] way through this maze." (App. 65a).

The decision of the court below is also in conflict with the decisions of other courts of appeals, which have been meticulous in their policing of trial courts to assure adequate compliance with Rule 52(a). See, e.g., *Alexander* v. *Nash-Kelvinator Corporation,* 261 F.2d 187, 190 (2 Cir.), modified 271 F.2d 524; *McManus* v. *Midland Valley Lumber Company,* 348 F.2d 898, 900 (4 Cir.); *United States* v. *Federal Insurance Company,* 483 F.2d 153, 158 (5 Cir.); *Lewis* v. *Pennington,* 400 F.2d 806, 817-18 (6 Cir.), *cert. denied* 393 U.S. 983; *Traylor* v. *United States,* 396 F.2d 837, 839 (6 Cir.); *National Popsicle Corp.* v. *Icyclair,* 119 F.2d 799, 800 (9 Cir.); *Carpenters Local 1273* v. *Hill,* 398 F.2d 360 (9 Cir.); and *Plumbers & Fitters, Local 761* v. *Matt J. Zaich Const. Co.,* 418 F.2d 1054 (9 Cir.).

In each of these cases the Court of Appeals concluded that the district courts had failed to find the facts with the specificity mandated by Rule 52(a) and reversed and remanded with instructions to make such findings. *Plumbers* and *Carpenters,* both of which involved damages for violations of § 303 of the Act, are espe-

cially instructive. Here, as in *Carpenters,* "the testimony and trial briefs [were] of a highly detailed and technical nature." 398 F.2d at 363. In *Plumbers,* the court said:

> Our court has held that when damages are claimed for several distinct elements and the trial court has made a lump sum award, the case should be remanded for supplemental findings of fact on the issue of damages. Carpenters Local 1273 of United Brotherhood of Carpenters and Joiners of America v. Hill, 398 F.2d 360 (9th Cir. 1968). In that case, the lump sum was less than the total of each of the claimed elements of damages so that we had no adequate basis for review as to each element. Here, the award was equal to that claimed, but there is nothing which reveals a specified amount attributable to each element. 418 F.2d at 1059.

A remand for supplemental findings of fact on the issue of damages, as was ordered in *Plumbers,* was all the more necessary here since "the award was equal to that claimed" *originally* by plaintiff, an amount totally discredited by plaintiff's own accountant and exhibit. See p. 13 *supra.*

B. Interest

This Court has not heretofore decided whether the findings requirement of Rule 52(a) applies to the basis for a discretionary award or denial of prejudgment interest. The question is obviously of continually recurring importance in suits under a whole panoply of federal statutes which give one private party a cause of action for damages against another. "The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is

denied when its exaction would be inequitable." *Bd. of Commissioners* v. *United States,* 308 U.S. 343, 353. This Court has recently reminded that "discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles. * * * That the court's discretion is equitable in nature * * * hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." (*Albemarle Paper Company* v. *Moody,* 422 U.S. 405, 416). Accordingly, Rule 52(a), which makes meaningful appellate review possible, should be adhered to with respect to prejudgment interest, at least where the amount is not *de minimis.* And so the courts of appeals other than the court below, have held and have reversed and remanded where a district court failed to adequately delineate the basis for the grant or denial of prejudgment interest. *Robert C. Herd & Company* v. *Krawill Machinery Corp.,* 256 F.2d 946, 953 (4 Cir.), aff'd on another question, 359 U.S. 297; *McCrea* v. *Harris County Houston Ship Channel Navigation District,* 423 F.2d 605, 610 (5 Cir.) *cert. denied* 400 U.S. 924; *Wessel* v. *Buhler,* 437 F.2d 279, 284 (9 Cir.).

The decision below is in even sharper conflict with *Norte & Co.* v. *Huffines,* 416 F.2d 1189, 1191-92 (2 Cir.), where a district court's elaborate articulation of the basis for an award of prejudgment interest (288 F.Supp. at 865), was held inadequate since it did not show that the district court had considered *all* the factors which the Court of Appeals deemed relevant. Yet here, the Court of Appeals approved the award of pre-judgment interest although it could not know whether the District Court had considered *any,* much less all, relevant factors (or for that matter, factors

which were impermissible), and also could not even know that the District Court had exercised its discreton, and had not awarded prejudgment interest on the erroneous premise that it was required to do so.

This case also presents an important and recurring variant on the problem of findings concerning discretionary prejudgment interest awards—whether a Court of Appeals which substantially increases a judgment may award prejudgment interest on the total judgment, rather than remand to the trial court for renewed exercise of its discretion, in light of the changed circumstances, and if the appellate court may act, whether it must set forth the basis for its decision. Here, the Court of Appeals doubled the judgment, raising the interest to $350,000 and the entire total award against the defendants in excess of $1,400,000. Even if the original award of interest was proper, it by no means follows that the award on the much greater judgment still "is compensatory and * * * , in light of the substantial sum involved, [and] is in accord with 'fundamental fairness.'" *Norte & Co., supra,* 416 F.2d at 1191, following *Board of Commissioners, supra.*

Since it is the trial court's discretion which is called for, we submit, as do petitioners in *Bangor Punta Corp.* v. *Chris-Craft Industries,* now pending on petition for certiorari No. 75-355 (id. pp. 3, 33) that the court should have remanded the question of interest to the trial court for the exercise of that court's discretion. But if it was proper for the Court of Appeals to decide the issue in the first instance, that Court should surely have set forth the basis, if any, for its belief that the award was still equitable. Yet for aught that appears, that Court thought the award was

automatic given its approval of the trial court's (supposed) exercise of discretion on the original judgment. The award of such substantial sums without the slightest indication that the equitable standard declared by this Court has been followed is the antithesis of proper judicial procedure, and calls for correction by this Court.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

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STATUTORY APPENDIX

This case involves § 301 of the Labor-Management Relations Act of 1947, 61 Stat. 136, 156, 29 U.S.C. § 185, which provides in pertinent part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual members or his assets.
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> * * *
>
> (e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court

shall find the facts specially and state separately its conclusions of law thereon * * * Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.* * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of the fact and conclusions of law appear therein. * * *